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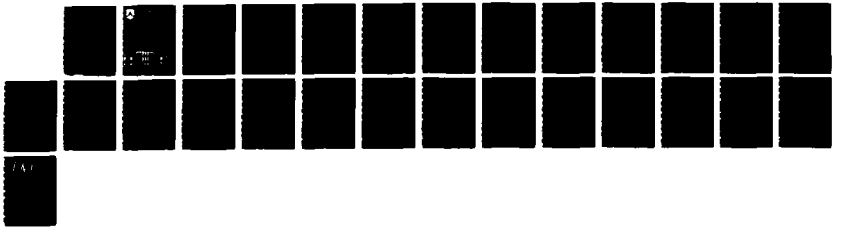

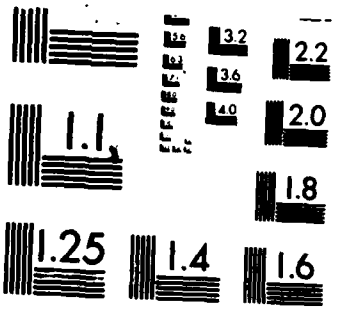

AIR WAR COLLEGE

RESEARCH REPORT

No. AU-AWC-86-028

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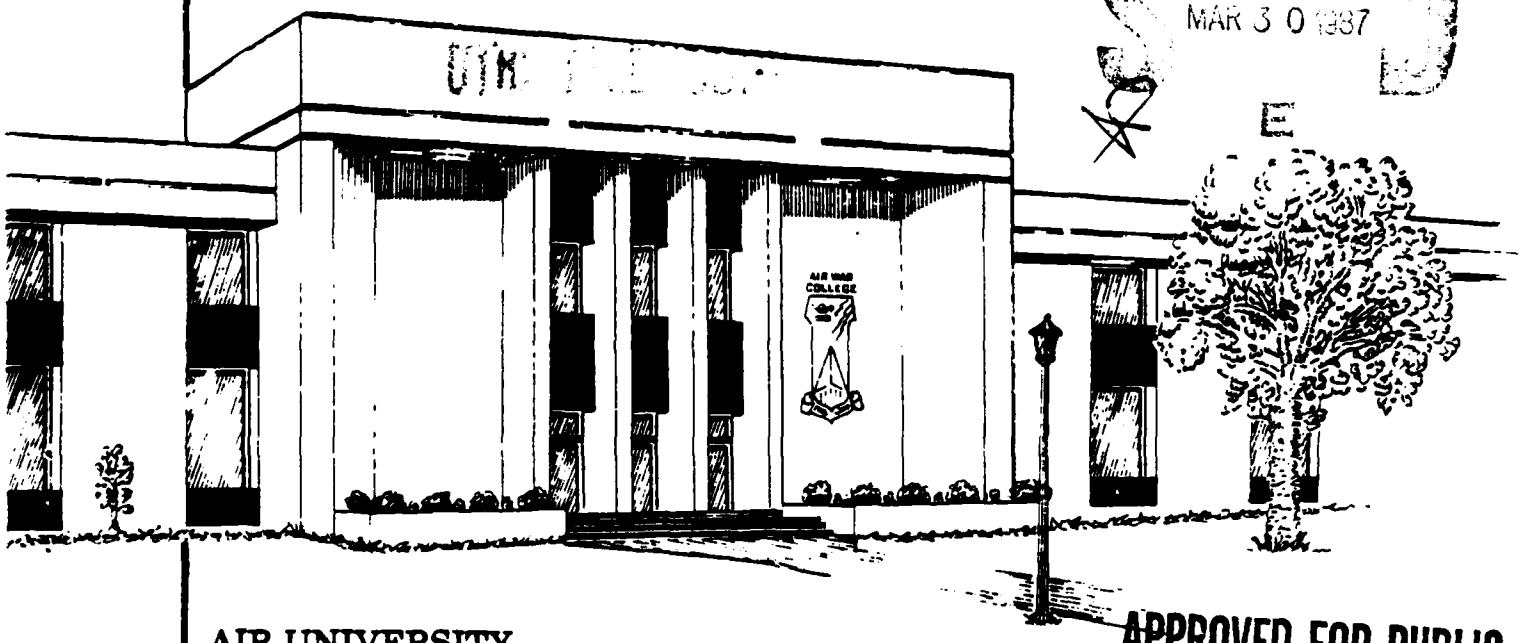
By LT COL JAMES F. BREITHAUPT, USAFR



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FREEDOM OF SPEECH VS. GOOD ORDER AND DISCIPLINE: ENFORCEABILITY OF THE BAR LETTER

by

James F. Breithaupt

Lieutenant Colonel, USAFR

A RESEARCH REPORT SUBMITTED TO THE FACULTY

IN

FULFILLMENT OF THE RESEARCH

REQUIREMENT

Research Advisor: Lieutenant Colonel Donald E. Morrissey

MAXWELL AIR FORCE BASE, ALABAMA

March 1986

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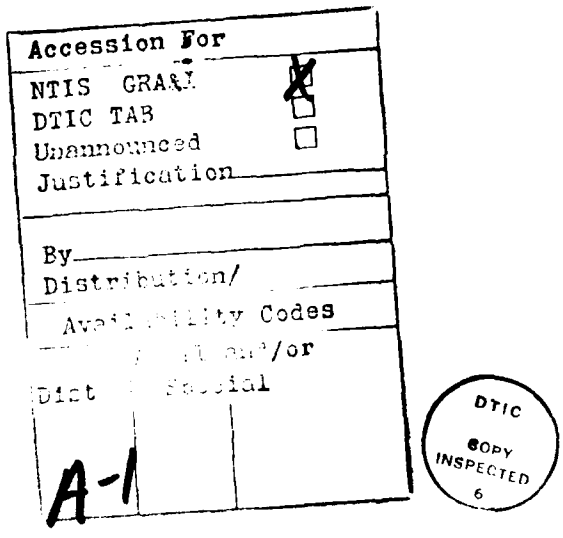

AIR WAR COLLEGE RESEARCH REPORT ABSTRACT

TITLE: Freedon of Speech vs. Good Order and Discipline: Enforceability of the Bar Letter

AUTHOR: James F. Breithaupt, Lieutenant Colonel, USAFR

Supreme Court and lower federal court decisions are analyzed and discussed with respect to their treatment of the balance between the citizen's right to freedom of speech versus the commander's right to preserve good order and discipline on the military installation. Special considerations are given to the open house as a potential public forum and the enforceability of the bar letter. Recommendations provide guidance for the issuance of enforceable bar letters.

BIOGRAPHICAL SKETCH

Lieutenant Colonel James F. Breithaupt (J.D., Syracuse University) is a member of the USAF Judge Advocate General Reserve. He is a member of the Florida and New York bars and is attached to ESMC/JA, Patrick AFB, Florida. He served on active duty as a Judge Advocate at MacDill AFB, Florida and the Republic of Vietnam, and has performed special active duty tours at Homestead AFB, Florida; Hurlburt Field, Florida, Patrick AFB, Florida; Charleston AFB, South Carolina; Maxwell AFB, Alabama, Castle AFB, California; Norton AFB, California, Travis AFB, California, and Dyess AFB, Texas. He is a graduate of the Air Command and Staff College, in residence, and the Air War College Correspondence Program.

In his civilian career, he has been an assistant professor at the University of Florida College of Law and Auburn University at Montgomery, and an adjunct professor at Santa Fe Community College and Alabama State University. He has also practiced law with Cahill, Gordon, New York City, served as a title attorney at the Florida state office of a nationwide title insurance company, and founded a Florida real estate brokerage. Lieutenant Colonel Breithaupt is a graduate of the Air War College, Class of 1986.

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CHAPTER I

INTRODUCTION

There are many cogent reasons for restricting access to military installations located in the United States. Closed bases and restricted areas have long been protected by fences, military police, courts, and federal law. However, various sectors of United States military installations are readily accessible to military personnel, dependents, contractors, workers, and visitors. Installation commanders are encouraged to hold annual open houses to promote relations with the civilian communities.[1] Throughout all this activity, the installation commander is charged with the preservation of good order and discipline.[2]

Occasionally, good order and discipline may be threatened by someone who enters upon a military installation. Federal statute provides that anyone who goes upon a military installation in the United States for any purpose prohibited by law or lawful regulation may be tried for a criminal misdemeanor.[3] Conviction thereof is punishable by fine of not more than five hundred dollars and/or imprisonment for not more than six months.

In addition, the installation commander may have a person removed from the installation.[4] Such removal may be accompanied with or followed by a bar letter which orders

such person not to reenter the installation without permission of its commander.[5] Subsequent reentry without permission is also a federal crime punishable by fine of not more than five hundred dollars, or imprisonment for not more than six months, or both.[6]

On the surface it appears that federal legislation and military regulations provide the commander with a viable means for ensuring the preservation of good order and discipline. The problem is that when the commander's action violates an individual's protected right of freedom of speech, the courts will not enforce the bar letter. The enforceability of federal law has been seriously challenged by intruders who assert that their presence and activities on the installation are constitutionally protected exercises of First Amendment rights.[7]

The right to freedom of speech is not absolute. Three landmark Supreme Court decisions have examined the circumstances surrounding unwanted intrusions on military installations and sought to balance the interests involved.[8] The key to understanding these cases ostensibly lies in the ability to discern the presence of a public forum. Free speech in a public forum is protected. Free speech in a private forum may be reasonably restricted. The Supreme Court addressed the public forum issue in the Flower[9] and Spock[10] cases. Although the Court reached different conclusions in each case, distinctions between the cases are

elusive. This elusiveness prompted a dissenting judge in the Spock case to write: ". . . if any significant distinction remains between the cases, it is that in Flower the private party was an innocuous leafleteer and here [Spock] the private parties include one of this country's most vociferous opponents of the exercise of military power."[11]

The free speech and public forum issues have been further complicated by the concept of the temporary public forum which arose in the Albertini case.[12] In this case, the Supreme Court was confronted with a lower court holding that a temporary public forum was created by open house activities.

The purposes of this paper are to analyze and discuss existing federal court cases in an attempt to reconcile these decisions into guidance for the commander. This discussion will provide a basis for recommendations which will enable the commander to discern and create the proper circumstances for the issuance of enforceable bar letters when good order and discipline are threatened by intruders upon the installation.

CHAPTER II

UNITED STATES SUPREME COURT--THE TRILOGY

In Flower v. United States,[1] the Supreme Court reversed the conviction of a leafleteer who had been distributing "Town Meeting on the Vietnam War" leaflets on New Braunfels Avenue within the limits of Fort Sam Houston. The leafleteer had been previously barred from the post and convicted for his reentry upon the military installation.[2]

The Court specifically found that First Amendment freedom of speech protected Flower from application of the federal reentry statute because the military had ". . . abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."[3]

The Court predicated its decision on its finding that Fort Sam Houston was an open post and that New Braunfels Avenue was a completely open street freely traversed by military, public, and private vehicles, and military and civilian pedestrians, at all hours of the day.[4] The dissenting opinion of Judge Rehnquist noted the manner in which this case affected the installation commander:

> The Court's opinion leaves the base commander with a Hobson's choice. He may close access to civilian traffic on New Braunfels Avenue and other traffic arteries traversing the post, thereby rendering the post once more subject to the authority that Congress intended him to have, but also causing substantial inconvenience to civilian residents of Bexar County

> who presently use these arteries. Or, he may continue to accommodate the convenience of the residents, but only at the cost of surrendering the authority Congress conferred upon him under 18 U.S.C. [Section][5]... 1382 to control access to the post he commands.

In effect, the United States Supreme Court held in Flower that a public thoroughfare was a public forum for exercise of freedom of speech even though such byway crossed and was part of an open military installation. Thus, the installation commander could not properly bar the speaker from this part of the installation because the commander had lost his authority over the public byway.

Greer v. Spock[6] was a case which rose to the United States Supreme Court from Fort Dix. This case involved a political candidate who requested permission to enter Fort Dix for the purpose of distributing campaign literature. The installation commander denied the request. Suit was commenced to enjoin enforcement of Fort Dix regulations which governed political campaigning and literature distribution, on the ground that these regulations violated the First Amendment right to freedom of speech.

In Spock, the Court found that Fort Dix had not become a public forum and that its regulations did not unconstitutionally deny the right of freedom of speech. Although the main entrances to Fort Dix were normally unguarded and civilians were permit ed to freely visit unrestricted areas of the post,[7] it was . . the business of a military installation like Fort Dix to train soldiers,

not to provide a public forum."[8] The Court specifically pointed out that:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.[9]

The Spock decision did not overrule the Flower case even though the Court said: "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."[10] Presumably, the installation commander at Fort Sam Houston perceived such danger when he barred Flower from the base. There was no allegation that his actions were patently arbitrary or discriminatory.

It is suggested that the real distinction between these cases is that Spock asked the commander to provide him a forum and was denied. Denial of the request did not violate constitutional rights. Flower assumed a forum on the base. His conviction for reentry on the installation was reversed because the Court found he had a constitutional right to freedom of speech on the open street through the post. Regulations which require permission to hand out

leaflets on a military installation have been subsequently found to be facially constitutional.[11]

In the most recent Supreme Court consideration of freedom of speech versus the commander's right to protect discipline and good order, the defendant assumed a forum on Hickam Air Force Base.[12] The Court reversed a lower court decision and upheld a conviction under 18 U.S.C. Section 1382.

In the Albertini case,[13] the defendant reentered Hickam Air Force Base during an open house. Nine years earlier the defendant had been issued a bar letter which provided that he was not to reenter Hickam Air Force Base without written permission from the commander. Albertini was escorted off the base and subsequently was tried and convicted for his reentry.

The Court concluded that the open house activities did not provide Albertini with permission to reenter. "The fact that respondent had previously received a valid bar letter distinguished him from the general public and provided reasonable grounds for excluding him from the base."[14]

The Court did not decide whether Hickam AFB had become a temporary public forum, although it stated that: "The conclusion of the Court of Appeals that Hickam was ever a public forum is dubious."[15] The Court reasoned that the public forum requirement was unnecessary because Albertini had previously received a valid bar letter. The Court

concluded that: "Where a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public."[16] The large number of people present at the open house seemed to provide greater justification for enforcement of the bar letter.

In rendering the Albertini decision, the Flower case was said to be inapplicable because there had been no military abandonment of any claim of special interest in regulatory expression, or suggestion that the bar letter was improperly predicated upon constitutionally protected activity. While Spock was utilized to reiterate principles for determining a public forum, the Court never decided this issue in Albertini. The majority opinion rendered in each decision found no inconsistencies in prior Court rulings.

CHAPTER III

FEDERAL COURT DECISIONS

Several lower federal courts have considered the balance between the interests of commander and the constitutional right of freedom of speech. The ninth circuit court of appeals in the Albertini case, which was subsequently reversed by the Supreme Court, discussed the effects of the creation of a public forum on a military installation:

> If the government creates such a forum, even though under no duty to do so, its power to exclude expression is severely limited . . . . Although the government is not required to maintain indefinitely the open character of the facility, as long as it does so it is bound by the same standards as apply in the traditional public forum.[1]

It is evident that the potential danger of creating a public forum on a military installation is increased through this allusion to the effects of the temporary public forum.

In United States v. Gourley,[2] the tenth circuit federal court of appeals found that the grass outside the Air Force Academy chapel during visiting hours and the Academy stadium before and during a football game were public forums. Thus, activities of the defendants in kneeling in silent protest to the Vietnam War and passing out anti-war pamphlets were proper exercises of First Amendment rights and could not legally predicate bar letters. Therefore, convictions for subsequent reentries were reversed and dismissed.

The seventh circuit federal court of appeals also examined the predicate to the bar letters in determining whether to affirm convictions for reentry in United States v. Quilty.[3] In this case, convictions were upheld because bar letters had been predicated upon a prior anti-nuclear demonstration on the Rock Island Arsenal.

In the Quilty[4] case, the defendants ingeniously raised the defense of necessity by asserting that their criminal conduct in reentry was necessary to avoid a more serious harm--nuclear war. The court found that there were reasonable alternatives to their actions which negated their defense. The court stated: "There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls . . . to name only a few."[5] Rock Island Arsenal was not such a forum.

In United States v. Bowers,[6] a federal district court held that where the parties had stipulated that Griffiss Air Force Base was a restricted or "closed base,"[7] the defendant's motive for reentry was irrelevant.[8] The defendant had been given a debarment letter when he refused to leave the base after permission to distribute a leaflet had been denied by the commander. The court stated that: "Nothing in Greer[9] or Brown[10] supports the proposition that the failure of the Air Force to review a publication

permits its distribution."[11] The defendant was convicted for reentry upon the installation following the receipt of a bar letter.

In United States v. Jelinski,[12] the fifth circuit federal court of appeals held that the basis for issuance of the bar letter was irrelevant to a prosecution for subsequent reentry.[13] The court said: "We do not doubt the Commander's historically recognized authority to summarily bar civilians from a military establishment in the exercise of his discretion in managing the internal operations of the military facility."[14] In Weissman v. United States,[15] the tenth circuit federal court of appeals stated: "As a matter of law, there may be no challenge to the General's statement of the reason for the bar order."[16]

The somewhat arbitrary approach of the Jelinski and Weissman cases was tempered in the Bowers case[17] in its assertion that:

> In this court's view the best rule is to allow a defendant charged with a violation of [Section] ... 1382 to inquire into whether the commanding officer acted in an arbitrary or capricious manner when issuing the bar letter. . . .
> This standard strikes a balance between allowing the accused an opportunity to have a court review the actions of the commanding officer while preventing the court from meddling in the day-to-day affairs of operating a military installation.[18]

To overcome the risk that the predicate for a bar letter may not receive court review, there is authority that a bar letter may be challenged in federal court prior to receipt.[19] It is noted that in one case,[20] a civilian bar

letter recipient was entitled to a hearing relative to her bar letter because the bar letter effectively denied her any employment opportunities on the Fort Sheridan Military Reservation.

When the recipient of a bar letter reenters the military installation and is prosecuted, his motive or intent for reentry is not a component of his offense.[21] In Holdridge, the eighth circuit federal court of appeals rejected a defense to prosecution under 18 U.S.C. Section 1382 which sought to show that the defendants climbed the fence and reentered the Mead Ordnance Depot because they were motivated by religious beliefs concerning the immorality of war. Predictably, the court in Holdridge found no violations of First Amendment guarantees.[22]

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

The trilogy of Supreme Court decisions involving freedom of speech and the commander's right to preserve good order and discipline on the military installation may be reconciled. Flower says that when a bar letter is improperly predicated on constitutionally protected activity, it may not be enforced against a person exercising the right of free speech in a public forum. Spock says that ordinarily a military installation is not a public forum. Therefore, a commander may refuse a request to provide a forum for political activity when his base is not a public forum. Albertini says that whether a military installation is a public forum, or a temporary public forum, is not relevant to the enforcement of a bar letter against its recipient when the bar letter has been properly predicated upon unprotected activity which has created a perceived threat to good order and discipline on a military installation.

The decisions of lower federal courts provide additional guidance. For the most part, these cases suggest that the constitutional issue may be raised collaterally in an attack upon the bar letter itself or raised defensively against criminal prosecutions for reentry.

Analysis of federal case law indicates that the courts will uphold the commander who carefully follows the directive of the federal regulation which provides that he may deny access to his installation to preserve order and safeguard persons and property provided that he does not act in an arbitrary or capricious manner.[1] Therefore, it is recommended that the commander should temper his actions in order to avoid any appearances that he may be acting arbitrarily or capriciously.

The public forum issue creates a danger to the enforcement of the bar letter. Therefore, it is recommended that the commander should avoid favoring one group over another in the conduct of open house activities.

> The basic thrust of these cases is to limit regulation to that which proscribes expression that is "basically incompatible with the normal activity of a particular place at a particular time" . . . . Put succinctly, to permit the use of a military base as a public forum is fundamentally incompatible with the purpose of the base. Those who would urge such use would no doubt be among the first to decry the military's "entanglement with partisan political campaigns of any kind . . . ." Yet their promptings, if yielded to, inescapably would tend to bring about precisely that entanglement.[2]

Finally, with respect to any contemplated bar letter action, it is recommended that the commander review the circumstances giving rise to his contemplated action with his Staff Judge Advocate. Such review should consider the physical location of the objectionable action or presence of the intruder, and the possibility that such place may have the trappings of a public forum. If such trappings exist,

the commander should refrain from bar letter issuance where free speech rights are being exercised. It is suggested that bar letters should be conservatively issued in order to preserve their effectiveness in the preservation of good order and discipline.

NOTES

CHAPTER I (Pages 1-3)

1. AFR 190-1(C3), para. 4-29 (15 Apr. 1985).

2. 32 C.F.R. Section 809 (1972); United States v. Hall, 742 F.2d 1153 (9th Cir. 1984).

3. 18 U.S.C. Section 1382 (1948).

4. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1960).

5. AFR 355-11, para. 3.b. (10 Sept. 1971).

6. 18 U.S.C. Section 1382 (1948).

7. U.S. CONST. amend. I.

8. Flower v. United States, 407 U.S. 197 (1972)(per curiam); Greer v. Spock, 424 U.S. 828 (1976), and United States v. Albertini, ____ U.S. ____, 53 U.S.L.W. 4844 (June 25, 1985).

9. Flower, 407 U.S. 197 (1972).

10. Spock, 424 U.S. 828 (1976).

11. Spock, 424 U.S. at 869.

12. United States v. Albertini, ___ U.S. ___, 53 U.S.L.W. 4844 (June 24, 1985).

CHAPTER II (Pages 4-8)

1. Flower v. United States, 407 U.S. 197 (1972)(per curiam).

2. 18 U.S.C. Section 1382 (1948).

3. Flower, 407 U.S. at 198.

4. Flower, 407 U.S. at 198.

5. Flower, 407 U.S. at 201.

6. Greer v. Spock, 424 U.S. 828 (1975).

7. Spock, 424 U.S. at 830.

8. Spock, 424 U.S. at 838.

9. Spock, 424 U.S. at 838, footnote 10.

10. Spock, 424 U.S. at 840.

11. Brown v. Glines, 444 U.S. 348 (1980).

12. United States v. Albertini, ___ U.S. ___, 53 U.S.L.W. 4844 (June 24, 1985).

13. Id.

14. Albertine, 53 U.S.L.W. at 4847.

15. Albertine, 53 U.S.L.W. at 4847.

16. Albertine, 53 U.S.L.W. at 4847.

CHAPTER III (Pages 9-12)

1. United States v. Albertini, 710 F.2d 1410, 1414 (9th Cir. 1983), rev'd, ___ U.S. ___, 53 U.S.L.W. 4844 (June 24, 1985).

2. United States v. Gourley, 502 F.2d 785 (10th Cir. 1974).

3. United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984).

4. Id.

5. Quilty, 741 F.2d at 1033.

6. United States v. Bowers, 590 F.Supp. 307 (N.D.N.Y. 1983).

7. Id. at 309.

8. Bowers, 590 F. Supp. at 309; see also Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960).

9. Greer v. Spock, 424 U.S. 828 (1976).

10. Brown v. Glines, 444 U.S. 348 (1980).

11. Bowers, 590 F. Supp. at 310.

12. United States v. Jelinski, 411 F.2d 476 (5th Cir. 1969), cert. denied, 396 U.S. 943 (1969).

13. Id. at 477 n. 6.

14. Jelinski, 411 F.2d at 478.

15. Weissman v. United States, 387 F.2d 271 (10th Cir. 1967).

16. Id. at 274.

17. United States v. Bowers, 590 F. Supp. 307 (N.D.N.Y. 1983).

18. Id. at 310-311.

19. Dash v. Commanding General, 429 F.2d 427 (4th Cir. 1970)(mem.), cert. denied, 401 U.S. 981 (1971); Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

20. Kiiskila, 433 F.2d at 747.

21. Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960).

22. Id. at 311.

CHAPTER IV (Pages 13-15)

1. 32 C.F.R. Section 809 a.1 (b)(1972); See also United States v. Hall, 742 F.2d 1153 (9th Cir. 1984).

2. United States v. Douglass, 579 F.2d 545, 549 (9th Cir. 1978).

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